SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 740

MARINA MERCANTE NICARAGUENSE, S.A., as owner of the Motor Vessel "EL SALVADOR",

Petitioner,

vs.

McALLISTER BROTHERS, INC., as owner of the Tug "RUSSELL No. 18", VIRGINIA RUTH EVANS, THERESA F. SALVESEN and CATHERINE MARIE FARGO,

Respondents.

REPLY BRIEF OF PETITIONER, MARINA MERCANTE NICARAGUENSE, S.A.

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I

It is pure semantics to urge that the Court of Appeals did not exonerate McAllister and the Tug "Russell 18" from liability for the negligence of its employees. McAllister was absolved from damages and allowed recovery. Whatever the Court of Appeals did there was no justification for the Appellate Court's substitution of its own findings for those of the Trial Court which did not see fit to invoke the doctrine of last clear chance. The Trial Court expressly found that the cutting of the line by the bosn, in an attempt to release the tug from its plight, was not the prime cause of the sinking. On the contrary, it held

that the various acts, omissions and faults of the ship and tug were substantially concurrent and contributory causative factors of the tug's sinking (248 F. Supp. 16, 24). Thus, the selecting out by the Court of Appeals of only certain faults, their division into two categories and the Appellate Court's determination that other material faults found by the Trial Court were not necessary for the disposition of this case (Petition p. 36) only serves to emphasize that the doctrine of last clear chance, assuming that it could be applied, was incorrectly applied in this case.

The Trial Court obviously was not clearly in error in refusing to fix sole responsibility for the tug's sinking on petitioner. There was evidence that the tug had the duty to station someone at the line so that the line could be let go if an emergency, such as occurred here, arose. The Trial Court also was not clearly in error in holding the "Russell 18" at fault because, on the morning of the disaster, it was unstable and readily susceptible to an *unusual* list. There was testimony that because of the malplacement of the tug's engine and auxiliaries it was detrimental to the stability of the tug if she was not kept on even keel at all times by proper manipulation of fuel or ballast.

II

Respondent, McAllister, is in error when it asserts that neither the Court of Appeals nor the District Court held or indicated that expert testimony must be accepted or was controlling or even preferable to testimony of fact witnesses whether in conformity with or in contradiction of expert testimony. The Court of Appeals expressly so held when it rejected the Trial Court's finding which was based on the testimony of the tug's Chief Engineer that the fuel which accumulated in the lazarette from a leak

amounted to 100 gallons (Petition pp. 20, 39) and the Trial Court did so in accepting the speculations of a naval architect that the "Russell 18" was caused to contact a channel bank when fact witnesses from the Port of New York Authority which constructed and was operating the channel at the time in question testified that there was no bank on the side of the channel where the "Russell 18" allegedly came in contact with a bank.

McAllister's brief also lacks candor when it asserts that certain conditions of the tug were pointed out to petitioner's experts but they were not called to the witness stand, when it asserts that the tug's Chief Engineer heard and felt conditions which supported a finding of contact with an alleged bank and when it asserts that the testimony of a witness whose duty it was to learn all that he could about conditions in the channel contradicted the testimony of the Port Authority that there was no bank in the channel.

The conditions which formed the basis for McAllister's expert's speculations that the "Russell 18" came into contact with the bank were not pointed out to the petitioner's surveyors and this was expressly admitted by McAllister's naval architect. He testified:

> "Q. These reports of these notes that you testified from regarding the presence of mud on the rudder and the propeller were personal notes of yours, weren't they? A. That's right.
>
> Q. They were never submitted to any other surveyors, were they? A. No, they were not.
>
> Q. In fact, you have never discussed with any of the other surveyors the alleged presence of mud on the propeller or on the rudder, did you? A. No, I did not." (R. 1402)

These experts of petitioner were not called because they attended the survey only to determine the nature and extent of the damage and the repairs necessary and to agree on the cost of repairs. The Trial Court was so advised (R. 1575) that such was the purpose for their attendance which was confirmed by McAllister's expert (R. 1397).

The Chief Engineer aboard the "Russell 18" at the time when the "Russell 18" allegedly was being pressed against the bank, dragged through the mud and her rudder jammed hard to starboard, neither heard nor felt the "Russell 18" come into contact with anything. He testified:

> "Q. In this case do you know whether the Russell 18 was in mud at the time or not? A. I don't know.
>
> Q. Do you know anything about the characteristics of the Port Elizabeth Channel? A. No.
>
> Q. While you were down in the engine room did you feel any contact? A. I did not.
>
> Q. Did you feel the tug contact anything? A. I did not.
>
> Q. Did you feel the tug's motion in any way be affected? A. Not for me to know.
>
> Q. Did you feel that it came into contact with something and it retarded the motion of the tug? A. No.
>
> Q. Other than this list that you noticed when the water was coming in, did you notice any movement of the vessel from side to side? A. No." (R. 344-355)

The Trial Court found that the "Russell 18" went down stern first.

No witness was called who fit the description of one whose duty it was to learn all he could about the conditions in the channel with the exception of employees of

the Port of New York Authority and they testified that there was no bank. Even the tug Captain whose testimony was pure hearsay (Petition p. 14) conceded that "all channels dredged cannot stand up vertical dredged". (R. 985)

III

While it may be true that McAllister did nothing more to keep the "Russell 18" on even keel than is done on thousands of other vessels, the "Russell 18" was unlike these thousands of other vessels. The engine and auxiliaries of the "Russell 18" were off center and, as a result, it had an inherent list unlike thousands of other vessels. Thus, the practice followed by other vessels, whose stability was not affected by the malplacement of their engines and auxiliaries, is not the proper standard by which the faults of McAllister and the "Russell 18", in that respect, should be measured. The Trial Court found unequivocally that, on the day of the disaster, the "Russell 18" was unstable and susceptible to "an unusual list" which list was not the result of the every day use and manipulation of fuel. The finding by the Court of Appeals that on the morning of the day in question the "Russell 18" was not unstable and susceptible to a list except in the usual sense was clearly error.

IV

Respondent, McAllister, is also incorrect on the law when it urges that the pilotage clause makes the pilot the borrowed servant of the shipowner and that petitioner assumes full responsibility for all of his acts, whether they fall within the terms of the pilotage clause or not. The law appears to be well settled that when one places his servant at the disposal of another for a particular service,

the servant becomes the servant of the latter only for that special service and remains the servant of the former for all other purposes. *Denton v. Yazoo & M. Valley R. Co.*, 1931, 248 U.S. 305, 308. Petitioner did not request McAllister to furnish a pilot to look for the buoy which was to be used as a guide out of the Port Elizabeth Channel and which buoy he knew was not on station before he came aboard petitioner's vessel. The pilot was requested for the purpose of piloting petitioner's vessel safely through the Port Elizabeth Channel and for his knowledge of the navigational guides and landmarks by which he attempted to steer the vessel. He was not engaged because he did not know the speed capability of the "Russell 18" but because of his supposed familiarity with the tug and ability to perform the service requested and to work with the "Russell 18". Any conduct on his part outside the services contracted for or any deficiency in his ability to perform the service properly falls outside the pilotage clause and is chargeable to the general employer, McAllister, and is not subject to limitation under 46 U.S.C. 183 because it is not a liability imputed by law by reason of the ownership of the vessel. *American Car & Foundry Co.* v. *Brassert*, 289 U.S. 261, 264 (1933). Since the acts of the pilot Skogen "were the prime cause of the tragedy" (Petition p. 42), absolving McAllister of all liability for damages and granting it half recovery of the tug's damages, was contrary to law.

CONCLUSION

The Petition for a writ of Certiorari should be granted.

Respectfully submitted,

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